

IN THE MATTER OF	:	BEFORE THE
WESLEY & REBECCA JENSON	:	HOWARD COUNTY
t/a ARROWWOOD SHEPHERDS, INC.	:	
	:	BOARD OF APPEALS
Petitioner	:	HEARING EXAMINER
	:	BA Case No. 12-027C

Section 131.H.4 Petition to Modify Condition
of Approval Imposed by Board of Appeals in
BA Case No. 09-030C

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DECISION AND ORDER

On April 18 and May 6, 2013, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the petition of Wesley and Rebecca Jenson, t/a Arrowwood Shepherds, Inc., (Petitioners), to modify a condition of approval imposed by the Board of Appeals in BA Case No. 09-030C filed pursuant to Section 131.H.4 of the Howard County Zoning Regulations (HCZR).¹

The Petitioners certified to compliance with the advertising and posting requirements of the Howard County Code. The Hearing Examiner viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Andrew Robinson, Esquire, represented Petitioners. Wesley Jenson and Rebecca Jenson testified in support of the requested modification. David Owens, Bonnie Beecraft and Ray Beecraft, Jr. testified in opposition to the petition.

¹ The Howard County Circuit Court affirmed the Board's decision on November 18, 2011 (C-C-10-84855AA), according to the petition.

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Petitioners introduced into evidence the exhibits as follows.

1. Board of Appeals Decision and Order 09-030C, October 20, 2012
2. Memorandum of Understanding Submitted as Petitioners' Exhibit 3 in BA 09-030C
3. Amendment to BA 09-030C Petition
4. Transcript of Proceedings from BA 09-030C hearing, June 29, 2010
5. Howard County Circuit Court Docket Information, Divorce Case

Opponent David Owens introduced into evidence the exhibit as follows.

1. BOA Case No 09-033C, copy of original petition

I.

A Preliminary Matter

The Technical Staff Report (TSR) recommends denial or dismissal of the requested modification based on information contained within an official code enforcement case file, CE 12-006(a)&(b).² This information consists of documentation for Howard County Circuit Court Case no. C-12-091534, which is described as a "Complaint for Absolute Divorce, or In the Alternative, Complaint for Limited Divorce and is signed by Rebecca Marie Jenson and filed with the Court of July 19, 2012" (the Complaint). According to the TSR, Paragraph 13 of the Complaint states, "[o]n or about May 26, 2012, the Plaintiff and the Defendant separated from one another, and they have lived separate and apart from one another, in separate abodes, without cohabitation since that date. . ." Perforce of this statement, the TSR concludes the filing of BA 12-027C is invalid because CU 09-030C appears to have expired on May 26, 2012, rendering moot the petition.

² The TSR Zoning History Section in this Modification of Condition petition identifies the cases as "pending" and Wesley L. Jenson and Rebecca Jenson as the responsible parties.

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At the outset of the hearing, the Hearing Examiner informed the parties she was striking or disregarding the TSR's reliance on the divorce language from the code enforcement cases for two reasons. First, Maryland courts instruct us that it is an improper exercise of the Hearing Authority's function to transform zoning application proceedings into a violation and enforcement process. For this reason, the Hearing Examiner may not deny the request modification in this case because Petitioners have allegedly committed violations of the conditions of a previous permit. *Klein v. Colonial Pipeline Co.*, 55 Md. App. 324, 337, 462 A.2d 546, 554, 1983 (internal citations omitted).

Secondly, the documentation in the CE 12-06(a) &(b) is part of a *pending* code enforcement action. A complaint was filed, presumably, and DPZ is investigating the complaint. Consequently, any information in a code enforcement case investigation file is just that – information of no legal or evidentiary weight. Importantly, the Hearing Examiner's denial or dismissal of the modification of conditions petition would be arbitrary and capricious absent a specific standard authorizing her to make such a decision owing to a violation of a condition of a previously granted conditional use permit. The sole mechanism by which an alleged violation of a conditional use permit condition may be prosecuted is the zoning code enforcement hearing process set forth in Section 16.1605 of the Howard County Code, which establishes a hearing process through which the Code Enforcement Hearing Examiner makes findings as to whether the county has shown, by a preponderance of the evidence, that the alleged violator has violated the laws or regulations in question.

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II.

The Requested Condition of Approval Modification

In Board of Appeals Case No. 09-030C, the Board of Appeals on October 20, 2010 approved Petitioners' conditional use petition to alter an approved conditional use for a dog kennel and pet grooming establishment in an RC-DEO (Rural Conservation: Density Exchange Option) subject to nine conditions of approval. This requested modification petition concerns condition of approval no. 7, which states "[t]he Conditional Use, as amended, shall be personal to Wesley and Rebecca Jenson and shall expire immediately in the event either Wesley Jenson and/or Rebecca Jenson does not occupy the Property as their/his/her own personal residence." Petitioners are requesting this condition be modified to make the Conditional use personal to Wesley Jenson only.

III.

Petitioner Testimony and Evidence

Testimony of Wesley Jenson

Wesley Jenson testified that he and his wife are in the process of divorcing. Currently, Rebecca Jenson resides in one part of the residence at 3101 Florence Road and he resides in another part.

Testimony of Rebecca Jenson

Rebecca Jenson testified to being involved part-time in the business side of the dog kennel operation. She has a second job unrelated to the kennel operation. Her husband does all the training.

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Concerning condition of approval no. 7, Ms. Jenson testified it originated as part of an agreement between Petitioners and their neighbors Mark and Carolyn Shaffer, which they memorialized in a memorandum of understanding (MOU) drafted by the Shaffers' attorney. The MOU concerns certain agreed-upon amendments to the BA 09-030C petition on appeal to the Board of Appeals. The Jensons introduced the MOU and an amendment to the petition into evidence during the BA 09-030C June 29, 2010 hearing. Petitioner Exhibits 2 and 3. Condition xi of the MOU and Condition 11 of the petition amendment are identical to Condition of Approval No. 7 in the BA 09-030C Decision and Order.

Ms. Jenson further stated she and her husband are separated and in the process of divorcing. She explained that she lives on one floor and her husband lives on another. Their respective lawyers worked out this arrangement. She owns four vehicles. She leaves the house just before 7:00 a.m.

Concerning her continued residency at 3101 Florence Road, Ms. Jenson introduced into evidence Petitioners' Exhibit 5, a copy of the Howard County Circuit Court docket for the Jenson divorce (Case No. 13C12091534). In the Plaintiff/Information section, Ms. Jenson's address is given as 3101 Florence Road, where she testified to residing since the filing of the divorce complaint. Petitioners' Exhibit 5.

Ms. Jenson read into the record a portion of a May 5, 2013 amendment to the divorce complaint, stating that they are living separately and apart, but residing in the marital home in

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separate accommodations on separate floors. They have so resided in this manner since May 26, 2012. Ms. Jenson will move out at a future date.

On cross-examination by David Owens, Ms. Jenson testified the purpose of condition no. 7 was to prevent continuation of the kennel use if the property was sold.

IV.

Opponent Testimony and Evidence

Testimony of David Owens

David Owens testified that Ms. Jenson no longer resides at 3101 Florence Road. He has not seen her on the property, enter or leave the property, or observed any of her vehicles on the property for about one year. He referred to the Jensons' divorce complaint in support of this claim.

Concerning the reason for condition of approval no.7, Mr. Owens introduced into evidence the original conditional use petition in BA 09-033C. Opponent Exhibit 1. He referenced language from the petition supplement, wherein the Petitioner states the proposed use would be a family run business with Wesley Jensen being a full-time manager and his wife as part-time.

Throughout his testimony, Mr. Owens expressed a concern about area safety as one reason for condition no. 7. He is also concerned that the kennel works with aggressive dogs that go after people and other animals.

Testimony of Bonnie Beecraft

Mrs. Beecraft, a neighbor, testified to not having seen Ms. Jenson for some time.

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Testimony of Raymond Beecraft

Mrs. Beecraft, a neighbor, testified to not having seen Ms. Jenson on his way to work in his agricultural fields, while working in the fields, or when leaving the fields.

V.

Discussion

HCZR Section 131.H.4 authorizes a property owner or conditional use holder to petition the Hearing Authority for modification of conditions imposed in a conditional use Decision and Order subject to certain procedures, including a public hearing.³ Petitioners' public hearing in this case began on April 18, 2013. During the hearing, the Hearing Examiner forthrightly expressed reservation about modifying a Board of Appeals imposed condition of approval where the Decision and Order itself made no findings concerning the grounds for it.⁴ For this reason, she continued the hearing to allow the parties opportunity to provide testimony and evidence on the circumstances of its imposition.

³ Section 131.H.4 provides as follows.

- a. A petition for modification of conditions shall be submitted in the same format and include the same information as a conditional use petition, clearly indicating the approved conditional use, the requested modifications, and the reasons for the request.
- b. A petitioner shall certify that a copy of a request for modification of a condition to a conditional use Decision and Order has been sent by certified mail to adjoining property owners identified in the records of the Maryland of Assessments and Taxation and the parties of record, whose addresses shall be maintained by the secretary to the Hearing Authority.
- c. The Hearing Authority shall hold a public hearing in accordance with the procedures for a conditional use petition. The public hearing shall be limited to consideration of the modification requested by the petitioner.
- d. The Hearing Authority shall issue a written decision either upholding or modifying a condition imposed in the original Decision and Order.
- e. After a decision is made, a new petition requesting modification of any of the conditions of approval shall not be accepted for at least 24 months after the date of the decision modifying or upholding the conditions of the original Decision and Order.

⁴ The residency requirements imposed in conditional no. 7 were not a concern during the Hearing Examiner proceeding in BA 09-030C. The Hearing Examiner denied the petition.

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At the continuation hearing, Petitioner Rebecca Jenson discussed the inclusion of the proposed residency condition in the MOU. Petitioners' Exhibit 2. The MOU explains the Shaffers' stated concerns about the proposed expansion of the kennel at the March 15, 2010 hearing on BA 09-030C and the Shaffers' agreement not to further oppose the petition before the Board of Appeals upon the inclusion of the 11 MOU conditions and restrictions in an amendment to the BA 09-030C petition. Such amendment was introduced as an exhibit at the June 29, 2010 continuation hearing.

Having heard the testimony and reviewed the evidence, the Hearing Examiner is satisfied a modification of condition no. 7 would not compromise the Decision and Order. Concerning first Opponents' opposition to the requested modification based on their claims that the conditional use has expired because Ms. Jenson no longer resides at 3101 Florence Road, the Hearing Examiner finds credible Ms. Jenson's evidence and testimony documenting her legal residency at this address. Petitioners' Exhibit 5 is a copy of the Howard County Circuit Court Docket Information for the Jenson Divorce Case, which give Ms. Jenson's address as 3101 Florence Road.

This finding notwithstanding, it is the Hearing Examiner's view that the issue of whether or not Ms. Jenson resided at this address when Petitioners filed their petition to modify condition no. 7 is not the determinative factor in her evaluation of the petition. The Conditional Use language of HCZR Section 131 includes several provisions through which property owners and persons with approved conditional uses may extend the time to establish the use, enlarge

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or alter the use, and even modify or remove a condition of approval. The intent of these provisions is to provide flexibility to property owners or conditional use holders, not to place them in a "gotcha" position. Certainly, it is a common practice in Howard County to seek retroactive approval of a conditional use, a practice that logically and fairly applies by extension to applications for a retroactive modification of a condition of approval.

The Hearing Examiner has also considered that it was the Petitioners and the Shaffer neighbors who executed the MOU to incorporate condition no. 7 into the amended petition as a display of good faith of the petitioners' desire to operate a more modest and less intense kennel use, not the neighbors who are now testifying in opposition to the condition of approval modification. Given the existence of the HCZR Section 131.H.4's procedure to petition the Hearing Authority to modify a conditional use condition of approval at the time of the MOU's execution, the Shaffers were on notice that the Hearing Authority could modify—even remove—the agreed upon condition at issue here as long as the Hearing Examiner considered their interest at the hearing.⁵ The Shaffers, though, did not appear at the modification hearing to express their reliance on the condition or to articulate the harm that they might incur from its modification. Nor did they memorialize the MOU in covenants recorded among the Land Records of Howard County, as was agreed upon in MOU paragraph 3, according to a proffer from Petitioners' counsel when queried by the Hearing Examiner.

⁵ A petitioner seeking to modify a condition of approval pursuant to HCZR Section 131.H.4.b must also certify that a copy of the request for modification of a condition to a conditional use Decision and Order has been sent by certified mail to adjoining property owners identified in the records of the Maryland Department of Assessments and Taxation and the parties of record, whose addresses shall be maintained by the secretary to the Hearing Authority.

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In light of these circumstances, the Hearing Examiner considered the consequences of granting the requested modification with respect to the eight other Board-imposed conditions of approval in BA 09-030C and the Board's general evaluation of the petition. These conditions address dog-training activities allowed as part of the kennel use dog-training parking, the number of personal pets housed on the property, the maximum number of dogs in a training session, hours of operation, outdoor lighting, and a ban on the use of the garage and rear yard of the dwelling for the kennel operation. Nothing in these conditions indicates to the Hearing Examiner that the requested modification would be inadvisable. The conditional use would remain personal to Mr. Jenson, who is the facility trainer.

The Hearing Examiner further concludes that a relaxation of condition no. 7 would not result in the concerns raised by the persons currently in opposition to the requested modification, such as aggressive dogs on the loose or fewer persons on site to watch the dogs during a training session or when Petitioners' own dogs are outside. When the Board approved BA 09-030C in 2010, Ms. Jenson had a limited role in the business side of the kennel operation and no involvement in dog-training. Moreover, Mr. Owens' safety concerns relate back to the use as originally proposed in the Jensons' BA 05-033C petition. According to Opponent Exhibit 1 and the TSR Zoning History for the Property, in 2007 the Hearing Authority originally approved a more intense kennel use, a facility with indoor/outdoor kennel runs, bathroom, grooming and kitchen facilities, and boarding. The Authority's approval of Petitioners' BA 09-030C petition granted the Jensons' request to alter the kennel use approved in BA 05-033C, permitting a less

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intense kennel use, which today is a dog-training facility only (with no boarding). The Hearing Examiner also takes note that the opposing neighbors have had about six years since the Board of Appeals first approved the kennel use to document problems with loose dogs and other safety concerns, but produced no evidence of such problems at the modification hearing. Their concerns continue to remain speculative apprehensions, which the Hearing Examiner may not consider.

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ORDER

Based upon the foregoing, it is this **20th day of May 2013**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

That condition no. 7 of the Board of Appeals decision and order in BA 09-030C is **MODIFIED** to read as follows.

7. The Conditional Use, as amended hereunder, shall be personal to Wesley Jenson and shall expire immediately in the event Wesley Jenson does not occupy the Property as his personal residence.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**



Date Mailed: _____

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 calendar days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.